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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES K. DORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury's verdict was inconsistent and against the weight of the evidence.
2. Whether the district court improperly allowed the government to argue that petitioner's church was a sham.
3. Whether the district court properly denied petitioner's motion to dismiss the indictment on the ground of selective prosecution.
4. Whether petitioner's prosecution on one count of the indictment was barred by the statute of limitations.
5. Whether one of the statutes governing the availability of a charitable deduction on an individual tax return is unconstitutionally vague.
6. Whether testimony from an IRS agent concerning petitioner's failure to produce records constituted reversible error even though the court struck the testimony from the evidence at trial.
7. Whether the district court erred in charging the jury that statements made in petitioner's amended tax returns were material as a matter of law.



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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-5a) is unpublished, but the judgment is noted at 902 F.2d 1567 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-5a) was entered on April 10, 1990. A petition for rehearing was denied on May 7, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 6, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of willfully making false statements on amended joint income tax returns filed for the 1981, 1982, and 1983 calendar years, in violation of 26 U.S.C. 7206(1). C.A. App. 9a, 14a-16a. He was acquitted of willfully making false statements on the original 1982 and 1983 income tax returns, and his wife was acquitted on all counts. Govt. C.A. Br. 6, 8; C.A. App. 9a. Petitioner was sentenced to 90 days' imprisonment, three years' probation, and a \$9,000 fine. Pet. App. 6a-7a.

1. Petitioner and his wife filed joint income tax returns for the years 1979 through 1983. C.A. App. 175a-177a. They also filed amended returns for 1981, 1982, and 1983, which claimed charitable contributions to the Universal Life Church (ULC) in the amounts of \$14,034, \$11,400, and \$11,050, respectively. C.A. App. 14a, 15a, 16a, 185a-189a, 191a-198a. The claimed contributions resulted in substantial reductions of the Dorries' tax liability. C.A. App. 377a-379a. Each return included a written declaration that it was made under penalties of perjury. C.A. App. 181a-182a. Petitioner admitted that he had prepared the tax returns. C.A. App. 531a.

Other than minor processing fees paid to ULC headquarters, all of the funds claimed as contributions were deposited into the bank accounts of a ULC branch church that the Dorries established in their home. C.A. App. 277a-278a, 362a-364a. The Dorries controlled the church bank accounts, and they used money in the accounts to pay their personal expenses. C.A. App. 320a-340a, 343a-346a, 359a-361a, 366a-372a.¹ Petitioner admitted

¹ Petitioner and his wife served as two of the church's three board members; the board was operated by majority rule. C.A. App. 542a,

that he had asked his wife to sign checks on the church accounts. C.A. App. 533a.

Petitioner, who became a "minister" in the Universal Life Church after paying a \$25 fee to ULC headquarters, was the "pastor" of his local church, while his wife served as treasurer. C.A. App. 277a, 287a-288a. Although petitioner claimed that all members of ULC churches everywhere were members of his church, the only members of his local church that he identified were himself, his wife, and those who served as the third member of the church's board. C.A. App. 540a-541a. Petitioner and his wife joined a local Catholic church during the period in which they belonged to the ULC. C.A. App. 266a-267a; 270a.

Kenneth Morris was one of a number of individuals who served for a period of time as the third board member. He testified, however, that he never attended any board meetings or church services. C.A. App. 217a-218a. Morris had established his own branch of the Universal Life Church, and he and petitioner engaged in "check swapping" by exchanging checks totalling \$1,000 to each other's church so that they could document contributions for tax purposes. C.A. App. 221a-224a.

Although the national Universal Life Church in Modesto, California, was granted status as a tax exempt organization in 1974, its tax exemption was revoked retroactively in 1984. None of the churches operated by the Dorries in their various residences was ever declared tax exempt. C.A. App. 238a-239a.

2. On appeal, petitioner raised ten claims of error. Pet. App. 3a-4a. After considering those contentions, the court of appeals affirmed the judgment of the district court without opinion.

545a. A board resolution gave petitioner and his wife the power to sign checks on the church's account. C.A. App. 544a-545a.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the jury's verdict was inconsistent and against the weight of the evidence. His argument is meritless.

a. Petitioner argues that, because he claimed the same charitable contributions on both the original and amended 1982 and 1983 returns, the jury's verdicts that he was not guilty of filing false original returns but was guilty of filing false amended returns are inconsistent. Even if petitioner were correct that the verdicts are inconsistent, he would not be entitled to relief. It is well settled that a defendant cannot attack a jury verdict of guilty on one count because it appears to be inconsistent with an acquittal on another count. *United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932). In any event, there is no inconsistency.

Petitioner filed the amended returns after he was interviewed in the summer of 1984 by two IRS special agents. At the interview, he was advised that a criminal investigation was being conducted. C.A. App. 275a-277a. In response to questions, petitioner falsely asserted that the contributions he claimed on his returns had been made to ULC headquarters in Modesto, California. C.A. App. 279a. The jury could have believed that petitioner had not acted willfully in filing the false original returns, but that his awareness of the criminal investigation and his act of lying to IRS agents established that he did act willfully in filing the false amended returns. See *United States v. Walsh*, 627 F.2d 88, 92 (7th Cir. 1980).

b. Petitioner also contends that the evidence was insufficient to convict him. "Sufficiency-of-the-evidence review involves assessment by the courts 'of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt.'" *United States v. Powell*, 469 U.S. at 67.

The evidence against petitioner was clearly sufficient. The elements of filing a false return under 26 U.S.C. 7206(1) are: (1) the defendant made and subscribed a return that was incorrect as to a material matter; (2) the return contained a written declaration that it was made under penalty of perjury; (3) the defendant did not believe the return to be true and correct as to every material matter; and (4) the defendant falsely subscribed the return willfully. See *United States v. Marabelles*, 724 F.2d 1374, 1380 (9th Cir. 1984). Of the four elements, petitioner does not dispute that the second element was satisfied.

The evidence showed that the returns at issue were materially incorrect. The law is clear that a person may not claim a charitable deduction for a gift over which he retains control (see *Hansen v. Commissioner*, 820 F.2d 1464, 1468 (9th Cir. 1987)), and there was substantial evidence that petitioner and his wife controlled the accounts of the church to which they "contributed." Moreover, the claimed charitable deductions affected the computation of the Dorries' tax liability. See *United States v. Graham*, 758 F.2d 879, 886 n.5 (3d Cir.), cert. denied, 474 U.S. 901 (1985). Therefore, petitioners' returns were incorrect as to a material matter.

The government also proved that petitioner knew that the returns were false. Except for minor processing fees, the "contributions" on which the deductions were based had been made to the branch church established and controlled by petitioner and his wife, and the money had been used to pay the family's personal expenses. This evidence, coupled with evidence that petitioner asked his wife to sign checks to and from the church account, was more than sufficient to establish that he was aware that the claimed "contributions" were deposited into accounts he controlled.

Finally, there was overwhelming evidence that petitioner acted willfully when he falsely subscribed the return, *i.e.*, that he voluntarily and intentionally violated a known legal duty (see *United States v. Pomponio*, 429 U.S. 10, 12 (1976)). The evidence that petitioner himself prepared the tax returns demonstrated that he was aware that the deductions at issue had been claimed. There was also ample evidence that he knew his control and personal use of supposedly contributed funds made the claimed deductions illegal. Prior to filing the amended returns, petitioner, who had a master's degree in business (C.A. App. 277a), was advised of the criminal investigation and was questioned about the charitable contributions he had previously claimed. Demonstrating his recognition of the falsity of the deductions at issue, he tried to hide the relevant facts from investigators: he falsely told two IRS special agents that the "contributions" had been made to the headquarters of the Universal Life Church in Modesto, California, and that the headquarters church had reimbursed him for his expenses. C.A. App. 279a-280a. See *United States v. Walsh*, 627 F.2d at 92 (false statements to IRS agent constituted proof of willfulness). Thus, the evidence established that petitioner claimed deductions to which he knew he was not entitled, in intentional violation of a known legal duty to file accurate returns.²

2. Petitioner argues (Pet. 12-15) that the trial court erroneously allowed the prosecutor to argue or suggest that petitioner's congregation was a sham. He contends that the prosecutor's argument was "contrary to the weight of the evidence" and violated his First Amendment rights.

² The returns themselves put petitioner on notice of this duty by requiring a declaration, under penalty of perjury, that they were true and correct to the best of petitioner's belief.

Although the First Amendment does not allow the government to question the validity of particular religious beliefs, it does permit inquiry into whether the beliefs are sincerely held and whether a church has been set up by the taxpayer for tax avoidance rather than religious purposes. See *United States v. Daly*, 756 F.2d 1076, 1081 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); *United States v. Peister*, 631 F.2d 658, 665 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981). See also *Mason v. General Brown Central School District*, 851 F.2d 47, 53 (2d Cir. 1988). Cf. *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2146 (1989).

The prosecutor's argument in this case did not challenge the validity of petitioner's claimed religious beliefs. The prosecutor specifically told the jury that the government had no intention of attacking petitioner or his wife for any religious principles to which they may have adhered and that the government did not intend to attack the Universal Life Church or its religious doctrines. C.A. App. 158a.³ The prosecutor's argument focused instead on the contention that petitioner's church served as a vehicle for petitioner and his wife to generate checks to support improper charitable contributions. C.A. App. 157a-158a, 672a. Because that argument did not implicate any First Amendment concerns, petitioner's claim of error is meritless.

3. Petitioner claims (Pet. 15-19) that the trial court erred in denying, without an evidentiary hearing, his motion to dismiss the indictment on the basis of selective prosecution.

To prevail on a selective prosecution claim, a defendant must show that the government was motivated by a dis-

³ The trial court charged the jury that the "dogma or *** practices" of the Universal Life Church were not at issue in the case. C.A. App. 749a.

criminator purpose and that its actions had a discriminatory effect. *Wayte v. United States*, 470 U.S. 598, 608 (1985). He must demonstrate both that he has been "singled out" while similarly situated persons have not been prosecuted, and that the decision to prosecute him was made on the basis of such impermissible considerations as race or religion. *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986); *Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986). To obtain an evidentiary hearing, petitioner was required to allege some facts tending to show that he was selectively prosecuted and raising a reasonable doubt about the prosecution's purpose. *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir.), cert. denied, 481 U.S. 1022 (1987).

Petitioner asserts that the fact that "[n]umerous tax payers have been assessed civil tax liabilities based upon their alleged contributions to the Universal Life Church" establishes that "others who were similarly situated as the Dorris family have not been * * * prosecuted for the same conduct." Pet. 18. Yet proof that the government has not prosecuted others who have contributed to petitioner's religion logically cannot support a conclusion that the government is discriminating against adherents of that religion. Moreover, in light of the flagrancy of petitioner's conduct and the strong evidence of willfulness, it was entirely reasonable for the government to proceed criminally, rather than civilly, in this case. Petitioner's allegation is therefore insufficient to support a selective prosecution claim.

Petitioner's assertion that numerous members of the ULC have been the subjects of IRS enforcement actions does not give rise to an inference that members of that church have been improperly targeted. The government is not forbidden to examine closely the returns of individuals who deduct charitable contributions to an organization

like the ULC. See *Mason v. General Brown Central School District*, 851 F.2d at 52-53. At the very least, a prerequisite to a selective prosecution claim would have to be evidence that the government does not investigate or prosecute individuals who fraudulently deduct contributions to other churches. Yet petitioner does not present any such evidence.⁴

4. Petitioner argues (Pet. 19-20) that Count 3 of the indictment, which charged him with making and subscribing a false amended return for the 1981 calendar year, was barred by the statute of limitations. The limitations period with respect to Section 7206(1) is six years. 26 U.S.C. 6531(5). The amended return for 1981 was filed on January 8, 1985 (C.A. App. 188a-189a). The indictment was filed on March 21, 1989,⁵ slightly over four years after the date of filing of the return and thus well within the limitations period. See *United States v. Samara*, 643 F.2d 701, 704 (10th Cir.), cert. denied, 454 U.S. 829 (1981).

Petitioner contends, however, that the limitations period ran from the due date of his original return for 1981, rather than the date on which he filed the amended return, because the same charitable deductions were claimed in both returns. That is clearly incorrect. Section 7206(1) proscribes "willfully mak[ing] and subscrib[sing]

⁴ Petitioner also asserts (Pet. 18) that his prosecution for making false contributions to the ULC on his tax returns for 1981, 1982, and 1983 "constitutes, in essence, a form of retroactive prosecution" (Pet. 18), since the Internal Revenue Service first revoked the tax exempt status of the parent ULC church in August 1984. The tax status of the parent church, however, was not relevant to this prosecution, which involved only "contributions" to the church located in petitioner's own home.

⁵ A superseding indictment correcting minor typographical errors was filed on August 22, 1989. Gov't C.A. Br. 6; C.A. App. 2a, 3a.

any return, statement, or other document" that the taxpayer "does not believe to be true and correct as to every material matter." The amended return constituted a "return * * * or other document" separate from the original return. Therefore, a new violation occurred when the amended return was filed. The fact that the new violation consisted of the repetition of an earlier false statement is immaterial. See *United States v. Samara*, 643 F.2d at 704.

5. Petitioner claims (Pet. 20-21) that 26 U.S.C. 170, the provision governing the deductibility of his claimed charitable contributions, is unconstitutionally vague. Petitioner's argument centers around the definition of "charitable contribution" in 26 U.S.C. 170(c). That subsection, in relevant part, defines a "charitable contribution" as

a contribution or gift to or for the use of * * * (2) A corporation, trust, or community chest, fund, or foundation * * * (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.

Petitioner argues that the phrase "net earnings" is too vague to support a criminal conviction.

The plain terms of Section 170 put petitioner on notice that he could not deduct as charitable contributions payments that went into accounts he controlled and were ultimately used to fund his personal expenses. Insofar as the terms of the statute require explication on this point, courts have long held, with respect to the provision of 26 U.S.C. 501(c)(3) employing the same terms, that "a member's ready use of the religious organization's funds for personal use * * * violates the inurement requirement."

United States v. Daly, 756 F.2d at 1083. Accord *Hall v. Commissioner*, 729 F.2d 632, 634 (9th Cir. 1984); *Founding Church of Scientology v. United States*, 412 F.2d 1197, 1202 (Ct. Cl. 1969), cert. denied, 397 U.S. 1009 (1970). See also *Smith v. Commissioner*, 800 F.2d 930, 934 n.2 (9th Cir. 1986).

Even without regard to the "inurement" requirement, petitioner's "contributions" were not deductible. Since petitioner and his wife retained control over the purported donations, those donations did not constitute "contributions" or "gifts" under the statute. See *Hansen v. Commissioner*, 820 F.2d 1464, 1468 (9th Cir. 1987); *Pollard v. Commissioner*, 786 F.2d 1063, 1067 (11th Cir. 1986). Cf. *Davis v. United States*, 110 S. Ct. 2014 (1990). In addition, contributions are deductible only if made to a recipient "organized and operated exclusively for religious * * * purposes." 26 U.S.C. 170(c)(2)(B). The evidence in this case established that a primary purpose behind petitioner's church was to generate tax benefits for petitioner. Notwithstanding petitioner's contention (Pet. 21) that the Code does not define the term "religious purposes," the generation of tax benefits clearly does not qualify as a "religious purpose." See *Hansen v. Commissioner*, 820 F.2d at 1468.

6. Petitioner claims (Pet. 21-22) that the prosecutor's questioning of IRS Special Agent Jack Bell concerning whether Bell ever received church records requested from petitioner constituted reversible error.

Agent Bell testified that he asked petitioner about his church records during a July 1984 interview and that petitioner described those records. C.A. App. 275a, 281a-282a. Agent Bell further testified that he requested the records. C.A. App. 282a. Bell was then asked whether he had ever received any of the records, and he replied that he had not. *Ibid.* Petitioner's counsel objected at sidebar to the question and answer. *Ibid.* The court struck them

and, at petitioner's request (C.A. App. 283a), told the jury to disregard them. C.A. App. 286a-287a.⁶ Although petitioner did not move for a mistrial, the court stated that none would be granted. C.A. App. 285a.

Relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), petitioner asserts that the stricken question and answer were "in violation of Petitioner's Fifth Amendment right and required a reversal of the conviction." Pet. 22. Petitioner's assertion lacks merit. In *Doyle*, 426 U.S. at 619, the Court held that it violated the Due Process Clause for the prosecutor to make use of a defendant's silence at the time of arrest after receiving *Miranda* warnings. Later cases indicate that *Doyle* rests on the fundamental unfairness of using a suspect's silence against him after he has been implicitly assured by *Miranda* warnings that it will not be so used. *Greer v. Miller*, 483 U.S. 756, 763 (1987).

There was no *Doyle* violation in this case. This Court in *Greer* noted that the Due Process Clause merely bars "the use" of a defendant's post arrest silence. 483 U.S. at 763 (quoting *Doyle v. Ohio*, 426 U.S. at 619) (emphasis in *Greer*)). Here, the trial court struck the question and answer at issue and clearly instructed the jury to disregard them. The fact that Agent Bell requested and did not receive the records "was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred in this

⁶ The court told the jury:

although it's been some time since the last question was asked and answered, I'm asking you, if you remember it, to disregard it. The question should not have been asked and * * * there shouldn't have been an answer either. So that the question and the answer are stricken. The defendant had no obligation to produce records for the agent on request. Therefore, you should draw no inference from the fact that the records were requested or that they were not produced. C.A. App. 286a-287a.

case." *Greer*, 483 U.S. at 764-765. See also *United States v. Lane*, 883 F.2d 1484, 1493-1495 (10th Cir. 1989), cert. denied, 110 S. Ct. 872 (1990).

7. Finally, petitioner contends (Pet. 22) that the trial court erred in instructing the jury that the charitable contributions claimed in petitioner's amended returns were material as a matter of law.

The courts of appeals that have addressed the question have all agreed that the materiality of a false statement on a tax return is a question of law for the judge to decide. See *United States v. Fawaz*, 881 F.2d 259, 261-262 (6th Cir. 1989) (citing cases from the First, Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits). The improper charitable deductions that petitioner claimed on his returns affected the computation of his tax liability. C.A. App. 377a-379a. The claimed deductions were therefore material as a matter of law, see *United States v. Graham*, 758 F.2d at 886 n.5, regardless of whether they had also appeared on petitioner's original returns.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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